OAH 65-1200-30780
Revisor's ID No. RD4189

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF EMPLOYMENT AND
ECONOMIC DEVELOPMENT

In the Matter of the Proposed Exempt Rules of the Minnesota Department of Employment & Economic Development Relating to Unemployment Insurance Hearings and Employer Record-Keeping Requirements In Minnesota Rules 3310 and 3315.

ORDER ON REVIEW OF RULES UNDER MINN. STAT. §§ 14.386 AND 14.388

On June 28, 2013, the Minnesota Department of Employment and Economic Development (Department) filed documents with the Office of Administrative Hearings (OAH) seeking review and approval of the above-entitled rules under Minn. Stat. §§ 14.386 and 14.388.

Based upon a review of the written submissions by the Department, and for the reasons set out in the Memorandum which follows below,

IT IS HEREBY ORDERED THAT the proposed exempt rules, Minnesota Rules 3310.2901 to 3310.2924, and 3315.1010, are not approved.

Dated: July 15, 2013

s/Ann O'Reilly
ANN O'REILLY
Administrative Law Judge

NOTICE

Minnesota Rule 1400.2400, subpart 4a provides that when a rule is disapproved, the agency must resubmit the rule to the Administrative Law Judge for review after it has revised the proposed rules. The Administrative Law Judge has five (5) working days to review and approve or disapprove the rule. Minnesota Rule 1400.2400, subpart 5 provides that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by an Administrative Law Judge. The request must be made within five (5) working days of receiving the Administrative Law Judge's decision. The Chief Administrative Judge must then review the agency's filing, and approve or disapprove the rule within 14 days of receiving it.

MEMORANDUM

On June 28, 2013, the Department filed with the Office of Administrative Hearings the following documents, requesting the approval of rule changes under the good cause exemption to rulemaking procedures under Minn. Stat. § 14.388:

(1) Four copies of the proposed Rules with Revisor's approval;

(2) A "memorandum" explaining the legal support for the proposed rule amendments;

(3) A proposed Order Adopting Rules (Proposed Order);

(4) A copy of the Notice of Intent to Adopt Rules Under Good Cause Exception (Notice of Intent to Adopt);

(5) A Certificate of Accuracy of the Mailing List; and

(6) A Certificate of Mailing the Notice of Intent to Adopt Rules under the Good Cause Exemption to the Rulemaking Mailing List (Certificate of Mailing).

According to the Notice of Intent to Adopt, the Department requests approval of various rule amendments under Minn. Stat. § 14.388, subd. 1(3), on the grounds that an exemption from ordinary rulemaking is warranted to "incorporate specific changes set forth in applicable statutes when no interpretation of law is required." The Notice of Intent to adopt also states that the general rulemaking provisions of Chapter 14 are unnecessary because the amendments "do not alter the sense, meaning, or effect of the rules." Thus, it appears that the Department also submits the proposed amended rules pursuant to Minn. Stat. § 14.388, subd. 1(4), governing changes that "do not alter the sense, meaning or effect of the rule." Consequently, the Administrative Law Judge has reviewed the submissions under both Minn. Stat. § 14.388, subd. 1, clauses 3 and 4.

NOTICE TO INTERESTED PERSONS

Minnesota Statutes section 14.388, subdivision 1, directs the Office of Administrative Hearings to review the proposed rule changes for legality and to

determine whether adequate justification has been provided for use of the good cause exemption. Subdivision 2 of section 14.388 requires that an agency proposing to adopt, amend, or repeal a rule under Minn. Stat. § 14.388 "**must give"** electronic notice of its intent (in accordance with section 16E.07, subdivision 3); **and** notice by United States mail or electronic mail to persons who have registered their names with the agency under section 14.14, subdivision 1a. (Emphasis added.) The notice must be given no later than the date the agency submits the proposed rule to the Office of Administrative Hearings for review of its legality, and must include:

(1) the proposed rule, amendment or repeal;

(2) an explanation of why the rule meets the requirements of the good cause exemption under subdivision 1; and

(3) a statement that interested parties have five business days after the date of the notice to submit comments to the Office of Administrative Hearings.

According to the documents filed by the Department, the Department mailed notice to the persons and associations who requested that their names be placed on the Department's rulemaking mailing list. The mailing included the Notice of Intent to Adopt and the proposed rules, but did not include the Department's memorandum explaining the proposed amendments to the rules. Nor did the Department submit to the OAH a list of the parties on the agency's mailing list.

There is no evidence in the record that the Department gave electronic notice to parties who may have requested it under Minn. Stat. § 14.14, subd. 1a.[1] According to the record here, the Department only provided notice to interested parties on the Department's mailing list.

In addition, the Department did not submit any specific evidence that the Notice of Intent to Adopt was published publicly in accordance with Minn. Stat. § 16E.07. A review of the Notice of Intent to Adopt does indicate that "the proposed exempt rule" was published on Department's website. Nothing in the record, however, indicates that the Notice of Intent to Adopt was published electronically. A review of the Department's website did, eventually, find a link to the Notice of Intent to Adopt. Accordingly, the Department has technically met the requirements of Minn. Stat. § 16E.07, subd. 3.

The Department did not, however, establish that it met the other notice requirements of Minn. Stat. § 14.388, subd. 2, because it has failed to document that it provided electronic notice of the proposed rules and Notice of Intent to Adopt to those parties who have requested notice by electronic mail.

Minnesota Statute section 14.388, subdivision 2 states that the agency must provide "notice by United States mail **or** electronic mail to persons who have registered their names with the agency under section 14.14, subdivision 1a." (Emphasis added.) While the sentence includes the word "or," it does not mean that the agency can simply

[1] If no parties have requested electronic notice, as opposed to mailed notice, the Department could have included a statement to that effect in its Certificate of Mailing.

ignore the parties that have requested that their notice be by electronic mail, as opposed to U.S. mail. Rather, a fair reading of the statute is that the agency must give notice to **all** the parties who have requested notice – both those parties who have requested notice by mail and those who have requested notice electronically. The word "or" is simply indicating that interested parties could choose which list to be on -- not that the agency could choose which list to use when providing notice. Thus, the Department has failed to establish that it provided the required electronic notice under Minn. Stat. § 14.388, subd. 2.

The form of notice given in this case is significant because mail notice, alone, greatly reduced the time for interested parties to review and properly respond to the significant changes proposed by the Department – especially in light of the holiday week in which the responses were due. According to the Department's Certificate of Mailing, the Department mailed the notice on Thursday, June 27, 2013. It then filed its documents with the Office of Administrative Hearings on Friday, June 28, 2013. If it took three days for mail service, interested parties may not have received the notice until Monday, July 1, 2013. That week was a holiday week with a national holiday (July 4th) falling on Thursday. The responses were due by Friday, July 5, 2013, five business days after June 27, 2013. This provided very little time for stakeholders to review and respond to the proposed exempt rules. The fact that two public comments were received does not negate the defect.

It could very well be that the Department provided electronic notice to those parties listed on its electronic mailing list but failed to provide evidence of the same when it submitted its rules for review. Nonetheless, the procedural defect in the record is material. Accordingly, the proposed exempt rules are disapproved on the grounds that the Department failed to establish compliance with the notice requirements of Minn. Stat. § 14.388, subd. 2.

COMMENTS FROM THE PUBLIC

Despite the defect in notice, two comments were received prior to the July 5, 2013, deadline. The first set of comments was submitted to the OAH electronically on July 5, 2013, by Charles Thomas, an attorney with the Southern Minnesota Regional Legal Services (SMRLS). The second set of comments was submitted on July 5, 2013, by Rob Hart on behalf of the Minnesota Recruiting and Staffing Association (MNRSA). These comments have been reviewed by the Administrative Law Judge and are described below.

The Department filed a response to the written comments on July 10, 2013, further explaining its position with respect to the rule changes. This response is detailed below.

USE OF THE GOOD CAUSE EXEMPTIONS

While the proposed exempt rules are disapproved on procedural grounds, to avoid review of the same submissions after the notice defect is remedied, the

Administrative Law Judge has reviewed the proposed rules under Minn. Stat. § 14.388, subd. 1(3) and (4) to determine whether or not the proposed rules qualify for approval under the good cause exemption.

Minnesota Statutes section 14.388 provides for an abbreviated and streamlined set of procedures for promulgating new rules that may be used when "good cause" is present. An agency may use the good cause exemption to rulemaking when an agency finds good cause that the rulemaking provisions of Chapter 14 are unnecessary, impracticable, or contrary to the public interest when adopting, amending, or repealing a rule to:

(1) address a serious and immediate threat to the public health, safety, or welfare;

(2) comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections 14.14 to 14.28;

(3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required; or

(4) make changes that do not alter the sense, meaning, or effect of a rule.[2]

Here, the Department apparently relies on Minn. Stat. § 14.388, subd. 1, clauses 3 and 4, for proceeding under the good cause exemption. Accordingly, it is the Department's burden to show in its submissions to the OAH that the proposed changes to the rules either: (1) incorporate specific changes set forth in applicable statutes and no interpretation of law is required; or (2) do not alter the sense, meaning, or effect of the current rule; **and** that it would be unnecessary, impracticable or contrary to the public interest to proceed with the standard rulemaking process. Failure to concretely establish these elements results in the disapproval of the proposed rules under Minn. Stat. § 14.388.[3]

Under the good cause exemptions, both the agency's rulemaking powers and the breadth of the review by the OAH Hearings are sharply reduced. This is because the good cause exemptions contemplate that administrative rules will only be promulgated with this method in order to meet truly exigent circumstances,[4] or when the policy choices underlying the new rules were made through an earlier, publicly-accessible process (such as a prior rulemaking or through the Legislature's enactment of a statute

[2] Minn. Stat. § 14.388, subd. 1.
[3] See e.g., *Jewish Community Action v. Commissioner of Public Safety,* 657 N.W.2d 604, 609-610 (Minn. Ct. App. 2003) (holding that an agency does not comply with exempt rulemaking requirements when the agency fails to demonstrate with reasonable particularity how rulemaking though the standard public rulemaking procedures set forth in Chapter 14 would harm the public interest).
[4] *See,* Minn. Stat. § 14.388, subds. 1 (1) and 1 (2) (2012).

which sets forth the specific requirements).[5] In these circumstances, the legal review completed by OAH is narrowed.[6]

Exempt rulemaking is an exceptional procedure and is generally reserved to address emergencies; to adopt court-prescribed or legislative changes; or to make non-substantive changes or clarifications to the existing rules.[7] As the Minnesota Court of Appeals has noted, the abbreviated exempt rulemaking process obviates the public's opportunity to bring to the agency's attention all relevant aspects of the proposed rules, which was intended to enhance the quality of the agency decision.[8] The exempt process has a negative impact on the statutory goal of "increase[ing] public accountability of administrative agencies."[9] Consequently, it should be used sparingly and must be viewed with scrutiny.

As detailed below, the rules proposed by the Department do not simply incorporate specific changes in applicable statutes. In addition, in many cases, the proposed changes alter the sense, meaning, or effect of the original rules. Thus, because the proposed rules fail to meet the applicable standard for exempt rulemaking, the Department must amend or withdraw the proposed rules.

RULE-BY-RULE ANALYSIS

While all of the proposed exempt rules have been disapproved on procedural grounds, the following proposed rules are also disapproved on the additional ground that they fall outside the scope of the statutory exemptions set forth in Minn. Stat. § 14.388, subd. 1, clause (3) or (4):

3310.2901 Scope and Purpose

The proposed amendment eliminates the lengthy description of the types of actions that are subject to the rules and replaces that description with just "timely appeals" and "referrals for direct hearing." The Department contends that untimely appeals are summarily dismissed and do not fall within the rule. However, the Department also acknowledges that unemployment law judges (ULJs) will often conduct fact-gathering inquiries to determine whether or not an appeal was timely filed. Thus, not just timely, but untimely, appeals have been subject to the procedures set forth in the original rule – at least until they are determined to be untimely.

By amending the rule, the Department is limiting the procedures to only "timely appeals," leaving uncertainty about what preliminary procedures apply to possibly untimely appeals. If a fact-gathering procedure takes place to determine whether an

[5] *See,* Minn. Stat. § 14.388, subds.1 (3) and 1 (4) (2012).
[6] For example, unlike a more typical rulemaking proceeding, rules presented under the good cause exemption are not examined as to their need or reasonableness. *Compare generally,* Minn. Stat. § 14.388, subd.1 (2006).
[7] *See Jewish Community Action v. Commissioner of Public Safety*, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003); Minn. Stat. § 14.388, subd. 1 (1) – (4).
[8] *Id.*
[9] *Id., citing* Minn. Stat. § 14.001(2).

appeal is timely, then some hearing procedure is taking place for ultimately untimely appeals. Accordingly, the amendment alters the sense, meaning and effect of the original rule and must be disapproved. By simply taking out the word "timely," the Department can likely remedy this defect.

3310.2902 Definitions

Subp. 5 Party. The Department adds to this rule the sentence: "The department is not a party to a hearing, unless the department was the employer of the applicant." The Department provides no citation to any statute that necessitates this particular change. Because this change was apparently not necessitated by a change in the statute, as required in Minn. Stat. § 14.388, subd. 1 (3), the Department must show that the change does not alter the sense, meaning or effect of the rule, if it intends to proceed with the exempt rulemaking process under clause 4 of the statute.

The change materially alters the rule and inserts ambiguity into the rules. In cases in which the Department has initiated an overpayment or fraud claim against an applicant for benefits under Minn. Stat. § 268.18, the Department may, indeed, be a party. As a result, this change alters the sense, meaning and effect of the rule, and must be disapproved.

3310.2905 Notice of Hearing

The first part of the amended rule incorporates much of the language from Rule 3310.2910, but not all of it. It leaves out the place of the hearing and the name of the judge. In addition, the amended rule removes the requirement that the notice of hearing inform parties that they should begin preparing for the hearing; that they should bring all documents and record to the hearing; and that they have a right to request the name of the other party's attorney, representative, or witnesses. Finally, it substantially alters the direct statement to the applicant about failing to appear at the hearing. Each of these changes is a material change and alters the sense, meaning and effect of the rule. These are not merely technical or minor changes. Thus, without some citation to the statute which necessitates these particular changes, these revisions must be disapproved.

With respect to the changes to subpart 2, item I, there appears sufficient statutory basis under Minn. Stat. § 268.105, subd. 1(a) for that change. However, with respect to the changes to subpart 2, item J, the proposed amendment does not relate sufficiently to changes to Minn. Stat. § 268.105, subd. 1(d), as the Department proposes. A better restatement of the statutory requirements for rehearing in Minn. Stat. § 268.105, subd. 1(d) would remedy this defect and render the change compliant with Minn. Stat. § 14.388, subd. 1(4).

3310.2908 Rescheduling and Continuances

The amendment removes two bases for seeking the rescheduling of a hearing: the inability to be present due to illness or other judicial or quasi-judicial proceedings

that have previously been scheduled. This is a material change that affects the sense, meaning, and effect of the rule.

In addition, the changes allow the judge to go forward with a hearing even if a witness is unavailable or there is a need to obtain documents, instead of just rescheduling the hearing. This is a material change that is not necessitated by a statutory directive; or at least no such statutory directive was cited by the Department. Accordingly, this change goes beyond that which is permissible under Minn. Stat. § 14.388, subd. 1 (3) and (4).

3310.2910 Consolidation of Issues and New Issues

The amended rule changes the sense and meaning of the existing rule by including new language about procedures for "new issues" and gives the judge discretion to either continue the hearing or direct the department to issue a new determination. This is a substantive change for which the Department does not provide any statutory basis. Therefore, this change goes beyond that which is permissible under Minn. Stat. § 14.388, subd. 1 (3) and (4).

3310.2912 Exhibits in Hearings

Originally, the rule applied only to procedures for telephone hearings. The changes, however, make the procedures apply to all hearings. This is a significant change. Further, by allowing submissions to be made by electronic transmission, there is potential for confusion with Minn. Stat. § 268.032(a) which limits the use of electronic submissions.

While each of these changes may be reasonable and necessary, they are material changes falling outside of the scope of an exempt rulemaking proceeding. These changes are not prescribed by statute and they alter the sense, meaning and effect of the rule. Accordingly, these are changes that should be submitted through the standard rulemaking process.

3310.2914 Subpoenas and Discovery

Subpart 1: The changes to this subpart eliminate a parties' ability to request a subpoena by telephone. This increases the formality of the process regularly used by *pro se* individual. In addition, the amendment substantially changes the process for a party to renew a request for a subpoena that has been denied. There is no statutory citation provided by the Department to support these changes. Thus, because the specific changes are not dictated by a change in the statute, and because they alter the sense, meaning, and effect of the rule, the changes fall outside of the scope of exempt rulemaking under Minn. Stat. § 14.388, subd. 1 (3) and (4).

Subpart 2: The change to this rule removes the obligation for parties to identify any documents they intend to introduce in the hearing. The Administrative Law Judge understands that this is intended to be consistent with the Department's procedure of requiring all documents to be used at hearing to be provided in advance. Nonetheless,

the change is a substantive one that alters the sense, meaning, and effect of the existing rule.

In addition, the proposed rule provides that the judge "may," as opposed to "must," continue a hearing in situations where a party fails to comply with disclosure requirements. The change from mandatory language to permissive language when it comes to granting a continuance is material. Thus, because the Department provides no statutory basis for the material changes, the amendments fall outside of the scope of those permitted under Minn. Stat. § 14.388, subd. 1 (3) and (4).

3310.2915 Disqualification of Unemployment Law Judge

The changes to this rule are not simply minor or technical. The existing rule directs that a judge "remove himself or herself" when the judge believes presiding would create the appearance of impropriety. The amendment changes the self-removal process into a process whereby the judge must request removal by the chief judge. This may well conform to the internal processes used by the judges, but results in a material change to the rule. The other changes to the rules are similarly substantive and alter the sense, meaning and effect of the existing rule. Without any citation to statutory change which necessitates the amendments, these material changes fall outside the scope of Minn. Stat. § 14.388, subd. 1 (3) and (4), and are subject to the standard rulemaking process.

3310.2916 Representation Before Unemployment Law Judge

The amendment removes the ability for a partnership to be represented by any of its members or authorized representatives, or for corporations to be represented by an officer or other representative. Contrary to the Department's argument, this change does not merely "simplify" the rule, it materially alters it.

Also, the amendments that change the circumstances in which a judge may refuse to allow a person to represent others in a hearing presents a material change to the rule. The amendment removes the judge's ability to remove a representative if that person "fails to observe the provisions of the law or rules." As a result, change alters the sense, meaning, and effect of the existing rule. The Department presents no statutory basis for the changes. Accordingly, the material changes fall outside the scope of Minn. Stat. § 14.388, subd. 1 (3) and (4).

In contrast, the addition of the sentence, "Except for an attorney-at-law, no person may charge an applicant a fee of any kind," is permissible as it fairly incorporates the provisions of Minn. Stat. § 268.105, subd. 6(b), and, thus, falls under the exception set forth in Minn. Stat. § 14.388, subd. 1(3).

3310.2917 Public Access to Hearings and Recording of Hearings

The proposed changes to this rule are material and substantive. While the amendments may well be positive changes that expand the public's access to hearings,

the changes, nonetheless, alter the sense, meaning, and effect of the existing rule. They are not merely technical or minor changes. Nor has the Department established that are they required by statute. Accordingly, the material changes fall outside the scope of Minn. Stat. § 14.388, subd. 1 (3) and (4).

3310.2919 Data Practices Notice

The Department has failed to establish that the repeal of the Data Practices advisory for participants in unemployment appeals is supported by a change in law. This deletion is a material change that alters the sense, meaning, or effect of the rules. Accordingly, the changes to the rule fall outside the scope of Minn. Stat. § 14.388, subd. 1 (3) and (4).

3310.2921 Conduct of Hearings

The Department asserts that all of the changes to this rule are necessitated by Minn. Stat. § 268.105, subd. 1(b), which states that: "The department has discretion regarding the method by which the evidentiary hearing is conducted." The proposed changes, however, give the chief judge, not the Department, the discretion to determine the form of the hearing. The other substantive changes relate to the duty of the judge to create a complete hearing record, to inform the parties of the hearing procedures, and to describe their rights therein. While these changes are meant to protect the parties to the hearings, they are, nonetheless, substantive changes that go beyond the requirements of the statute and alter the sense, meaning, and effect of the existing rule. Accordingly, the changes fall outside the scope of Minn. Stat. § 14.388, subd. 1 (3) and (4).

3310.2923 Official Notice

The change removes the requirement that "Parties must be notified of any facts officially noticed by the judge." Removal of this provision is not dictated by a change in law and alters the sense, meaning, and effect of the rule. Therefore, this revision falls outside the scope of Minn. Stat. § 14.388, subd. 1 (3) and (4).

3315.1010 Records

The deletions set forth in proposed Subpart 1 are substantive and material changes that are not dictated by law. In addition, the changes alter the sense, meaning, and effect of the rule. These changes substantially reduce the record-keeping requirements of employers. Therefore, they are substantive changes. It may well be that the changes are reasonable and necessary to reduce the burden on employers, eliminate unnecessary records-keeping, or provide clarity, as the Department argues. However, because most of these amendments are not necessitated by a specific change in the statute, they must be evaluated under Minn. Stat. § 14.388, subd. 1(4).

The only amendment supported by statute is the change of record preservation from eight years to four years. The Department contends that Minn. Stat. § 268.043(b) dictates the change. However, that is not necessarily true. Section 268.043(b) provides

that if there is fraudulent action, the four-year period may be extended. Accordingly, the statute does not necessarily require the change to a four-year period. It may, however, be a prudent change that could be promulgated under the standard rulemaking procedures of Chapter 14.

With respect to the changes in Subpart 2, the rationale for the change is that the Department no longer needs the information for the city and state in which the employer operates or from which the services are controlled. According to the Department, this level of detail was not useful and unnecessary for the Department. That, however, is not a valid basis for seeking a rule amendment under the good cause exemptions. Because the Department has not provided a statutory basis for the change; and because the changes do alter the sense, meaning, or effect of the rule, the proposed changes are outside of the scope of Minn. Stat. § 14.388, subd. 1 (3) and (4).

In contrast, changes to Subpart 3 are supported by statute and will conform the rule to the definition of "noncovered" employment under Minn. Stat. § 268.035, subd. 20. Therefore, this change is permissible under Minn. Stat. § 14.388, subd. 1(3).

CONCLUSION

The Department's submissions for a legal review did not make clear which rules were submitted pursuant to Minn. Stat. § 14.388, subd. 1(3), and which rule changes were submitted pursuant to Minn. Stat. § 14.388, subd. 1(4). The difficulty in deciphering which rules fall into which statutory exemption highlights that the exempt rulemaking process is inappropriate for these types of rule changes, given the scope and substance of the amendments.

As set forth above, most of the Department's proposed rules contain material substantive changes that are not required by specific changes in the law. As a result, they do not fall into the exemptions set forth in Minn. Stat. § 14.388, subd. 1, clauses (3) and (4). This is not to say that the proposed changes are unreasonable or unnecessary. Indeed, it appears that many of the substantive rule changes are non-controversial; are likely to conform to the Department's current internal practices; and may well be helpful to the public, the parties to these types of hearings, and the Department. However, unlike the standard rulemaking process set forth in Chapter 14, the exempt rulemaking process is extremely limited and narrow in scope.

Because the Department has submitted its rules for review under the exempt rulemaking process, the proposed rules must be carefully scrutinized. If the proposed changes do not fall within one of the four exceptions listed in Minn. Stat. § 14.388, subd. 1, then the standard rulemaking process must be utilized and the exempt rules must be disapproved.

The purpose of the rulemaking process of Chapter 14 is to ensure that agencies avail themselves to the public comment process, which enhances the quality and fairness of rulemaking. The exempt rulemaking process severely shortens the public comment process and, thus, should only be used in very limited circumstances. It is not

a process that should be used widely by agencies to amend their general rules to suit their needs or to avoid scrutiny. If the good cause exemptions were to be read liberally, it would render the standard rulemaking process useless. All agencies would simply submit their rule changes under the abbreviated process and avoid a more thorough review. It is for this reason that the Office of Administrative Hearings has always narrowly applied the exemptions and carefully scrutinizes rules presented under Section 14.388.

Because the Department failed to establish that it provided electronic notice to parties who requested such notice; and because the proposed rules, on a whole, contain substantive revisions that do not incorporate specific statutory changes, and which alter the sense, meaning, or effect of the rules, the proposed exempt rules are not approved.

A. C. O.